(2)

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, John Skelton, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Criminal Appeals of Texas. That opinion is not yet reported, but is reprinted in its entirety in the State's petition at A-1 to A-17 (hereinafter referred to as Pet. at ___).

NATURE OF THE CASE AND PROCEDURAL HI8TORY OF THE CASE

On July 17, 1982, a two paragraph indictment for, respectively, capital murder and murder was filed. Therein, it was alleged that on April 24, 1982, Respondent did:

> " . . . knowingly and intentionally while in the course of commiting and attempting to commit arson of a vehicle owned by Joe Neal, intentionally cause the death of Joe Neal, hereafter styled the Complainant by placing an explosive weapon on the vehicle of the complainant, and causing said weapon to explode.
>
> " . . . did then and there unlawfully, knowingly and intentionally cause the death of Joe Neal . . . by placing an explosive weapon on the vehicle of the Complainant, and causing said weapon to explode. . . . "

Upon learning of the indictment, Respondent voluntarily returned to Odessa from Missouri, turned himself in, and was thereafter released on bond.

In June 1983, the case proceeded to trial. Petitioner waived the second paragraph and proceeded to the jury only on the capital murder charge. The defense, simply stated, was that Respondent was in Missouri at the time of the commission of the alleged offense, as substantiated by numerous independent witnesses and documents. The jury was submitted a charge which allowed a conviction on a theory of individual OR party liability. A general verdict of guilty was returned and after affirmative answers to special issues were returned, a verdict of death was assessed on July 8, 1983. Respondent was taken into custody and has been on death row at the

Texas Department of Corrections since on or about July 8, 1983.

The mandatory appeal dictated by Article 37.071, Vernon's Ann. C.C.P. was pursued. In February 1985, Respondent's current counsel became involved in the case. At that point in time, no brief had yet been filed on behalf of Respondent due to massive delays in the preparation of the record on appeal.

On April 18, 1985, Respondent, with leave of court, timely filed a 156 page brief containing 63 grounds of error.

On April 4, 1986, almost one year later, Petitioner filed its 41 page response.

On May 20, 1986, Respondent filed an 85 page supplemental brief.

On May 21, 1986, oral argument was presented to the Court of Criminal Appeals of Texas.

From May 1986 through November 1987, Respondent filed three post oral argument supplemental briefs and three motions to expedite disposition of the appeal by the Court of Criminal Appeals. The State did not file any documentation with the Court of Criminal Appeals other than its brief on April 4, 1986.

On December 13, 1989, the Court of Criminal Appeals delivered an opinion reversing the judgement and ordering the entry of a judgement of acquittal due to insufficient evidence to show Respondent guilty as an individual *or* as a party. See Pet. at A-1 to A-17.

On December 29, 1989, Petitioner untimely filed its motion for rehearing, a copy of which was attached as Exhibit 2 to Respondent's response to Petitioner's motion to stay issuance of mandate filed with this Court on or about July 16, 1990 (hereinafter referred to Respondent's response). See Pet. at B-1. See Rule 230, Texas Rules of Appellate Procedure.

On February 1, 1990, Respondent filed his response to Petitioner's motion for rehearing, a copy of which was attached as Exhibit 3 to Respondent's response filed with this Court on or about July 16, 1990.

On May 2, 1990, the Court of Criminal Appeals denied Petitioner's motion for rehearing. See Pet. at C-1.

Pursuant to Orders of the Court of Criminal Appeals, the mandate of the Court of Criminal Appeals was stayed from May 16, 1990, until July 23, 1990. On or about July 16, 1990, Respondent, in anticipation that Petitioner would file a motion to stay (and due to the anticipated absence from the state of Respondent's counsel) filed with this Court his response to Petitioner's motion to stay issuance of mandate (hereinafter referred to as Respondent's response). On or about July 20, 1990, Petitioner filed its motion to stay issuance of mandate and petition for writ of certiorari. On July 23, 1990, Mr. Justice White granted Petitioner's motion to stay.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THIS COURT DOES NOT HAVE JURISDICTION.

"Petitioner's claim is based on the Fourteenth Amendment to the United States Constitution". Pet. at 2. Petitioner also asserts jurisdiction under 28 U.S.C. Section 1257(a). Pet. at 2.

Assuming, *arguendo*, that Petitioner is referring to the due process clause of the Fourteenth Amendment, it should be pointed out that nothing contained therein affords the State of Texas due process of law. Indeed, the Fourteenth Amendment is a limitation on the actions of the State of Texas. And, under *Collier v. Poe*, 732 S.W.2d 332, 344 (Tex. Cr. App. 1987), appeal dismissed, ___ U.S. ___, 108 S.Ct. 51 (1987) [dismissed for want of substantial federal question, which is a ruling on the merits], the State of Texas is not entitled to due process of law. Petitioner's reliance upon the Fourteenth Amendment is seriously misplaced.

Furthermore, 28 U.S.C. Section 1257(a) provides that this Court has jurisdiction to review, via writ of certiorari, a decision of the Court of Criminal Appeals where:

> " . . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Clearly, the validity of a treaty or statute of the United States is not in question. Similarly, no statute of the State of Texas is involved in this case. Finally, Petitioner (as demonstrated in the second through sixth reasons in support of a denial of the writ) failed in the state court to specially set up or claim any title, right, privilege or immunity under the Constitution of the United States. *See Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981)[Mr. Justice White, speaking for the Court, noted that petitioner failed to properly raise or preserve a federal question in the Georgia courts and that the petition for writ of certiorari must be dismissed due to that failure]. Respondent respectfully submits that jurisdiction over the instant petition for writ of certiorari does not exist and that the petition for writ of certiorari should be denied.

2. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT IN ANY MANNER, IN ITS RESPONSE BRIEF, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The "question presented" is:

> "Whether the Texas Court of Criminal Appeals has misapplied the Rule of Jackson v. Virginia 443 U.S. 307 (1979) by holding that the prosecution is under an affirmative duty to disprove every hypothesis except that of guilt beyond a reasonable doubt." Pet. at i.

Petitioner has complied with Rule 21.1(h) of the Rules of this Court by stating, pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule

of Jackson v. Virginia, 443 U.S. 307 (1979)". Although Respondent contends that Petitioner did not raise the "question presented" in its motion for rehearing (see number 3, *infra*), Petitioner's statement is an undeniable concession that Petitioner failed to present the "question presented" at any point in time prior to the motion for rehearing. Respondent asserts that this concession and the ramifications thereof justify a denial of certiorari.

Petitioner had the clear opportunity to raise the "question presented" in the Court of Criminal Appeals. In Respondent's opening brief, the standard of review was stated to be the following with respect to the grounds of error addressed by the Court of Criminal Appeals in its opinion:

> "Under *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Cr. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable. Id. at 803 citing *Denby v. State*, 654 S.W.2d 457 (Tex. Cr. App. 1983)." (as to liability as the sole actor: Ground of Error No. 7; Respondent's brief at pages 25-26)
>
> "Thus, while the circumstances are suspicious, a jury is not allowed to convict on speculation, *Jackson v. State*, 536 S.W.2d 371, 375 (Tex. Cr. App. 1976), and suspicion does not justify an affirmance by this Court; only proof beyond a reasonable doubt. *Waldon v. State*, 579 S.W.2d 499 at 502 (Tex. Cr. App. 1979). (as to liability as a party; Ground of Error No. 6; Respondent's brief at page 23).

In Petitioner's brief filed in response to Respondent's opening brief, Petitioner totally failed to set forth any

standard of review, let alone present to the Court of Criminal Appeals any assertion that the standard cited to it by Respondent was inconsistent with *Jackson v. Virginia, supra*. Petitioner's brief at pages 5 to 23. In fact, Petitioner only cited one case: *Rodriguez v. State*, 496 S.W.2d 46 (Tex. Cr. App. 1973), which addressed knowledge and control over narcotic drugs and did not address, directly or indirectly, the "question presented" in Petitioner's submission to this Court. Accordingly, Petitioner failed to afford the Court of Criminal Appeals the opportunity to pass upon the question it has presented to this Court. The failure to afford the Court of Criminal Appeals an opportunity to pass upon the question it seeks this Court to review is a procedural bypass of the Court of Criminal Appeals. *See Bloeth v. New York*, 369 U.S. 133, 82 S.Ct. 661, 7 L.Ed. 2d 780 (1962) [Mr. Justice Harlan, on application for stay of execution, stated that "it appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them]; *Webb v. Webb, supra* [outlining policy reasons why a petitioner must present to the state court the question he desires to present on certiorari or appeal]. Petitioner's procedural default justifies the denial of certiorari.

3. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT, ON MOTION FOR REHEARING, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

Respondent contends that Petitioner's assertion that it raised the precise "question presented" in its motion for rehearing, Pet. at 2, is inaccurate, lacking in candor, and directly contrary to the record. Petitioner did not raise the "question presented" and has thus failed to present the issue to the Court of Criminal Appeals and has procedurally bypassed its opportunity to complain to this Court.

In Petitioner's motion for rehearing to the Court of Criminal Appeals, Petitioner presented four points of error, as follows:

> "Point of Error Number One: The Court erred in holding that the reasonable hypothesis of the Appellant must be excluded to a moral certainty."
>
> "Point of Error Number Two: The hypothesis relied on by the Court i.e., that another unbeknownst to the Appellant committed the offense, is not a reasonable hypothesis."
>
> "Point of Error Number Three: The facts of the instant case are distinguishable from *Nathan* and *Flores* and the evidence is sufficient to uphold the conviction."
>
> "Point of Error Number Four: It is proper to uphold Appellant's conviction based on his status as a party."

See Petitioner's motion for rehearing, contained in Exhibit 2 to Respondent's response to Petitioner's motion

to stay issuance of mandate filed with this Court on or about July 16, 1990.

Under Point of Error Number One in its motion for rehearing, (i.e., Exhibit 2 attached to Respondent's response at page 3), Petitioner stated the following to the Court of Criminal Appeals:

> "The proper standard to apply in circumstantial evidence cases has known no little argument. *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989). *The current accepted status of the test holds that there are two components: first* that " . . . after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); and *second, "A conviction based on circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused* . . . It is not required that the circumstance should, to a moral certainty, actually exclude every hypothesis that the act may have been committed by another person, *but that the hypothesis is a reasonable one consistent with the circumstances and the facts proved* . . . Each fact need not point directly and independently to the guilt of the accused, as the cumulative effect of all the incriminating facts may be sufficient to support the evidence." *Carlsen v. State*, 654 S.W.2d 444, 447 (Tex. Cr. App. 1983); *Bulter, supra* 238 footnote 1. *The second step in this application, the exclusion of the reasonable hypothesis, is well settled in Texas Criminal Jurisprudence, and is "implicit" in any review based on Jackson. Bulter supra, id."* (emphasis added)

Thus, in its motion for rehearing, Petitioner was NOT COMPLAINING THAT THE COURT OF CRIMINAL

APPEALS HAD MISAPPLIED *JACKSON V. VIRGINIA, supra,* but was complaining *only* about the application of a standard that, under *state law,* contained a "moral certainty" component. Accordingly, Petitioner's statement, Pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule of Jackson v. Virginia, 443 U.S. 307 (1979)", is inaccurate, lacking in candor and directly contrary to the express wording of its motion for rehearing. Indeed, Petitioner failed to present to the Court of Criminal Appeals the "question presented" in the petition for writ of certiorari and thus procedurally bypassed its right to present the "question presented". *See Bloeth v. New York, supra; Webb v. Webb, supra.* Petitioner's procedural default justifies the denial of certiorari.

4. PETITIONER SHOULD BE ESTOPPED FROM PRESENTING THE "QUESTION PRESENTED" TO THIS COURT SINCE PETITIONER REPRESENTED TO THE COURT OF CRIMINAL APPEALS THAT THE UTILIZATION OF THE "EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST" WAS PROPER AND WELL ESTABLISHED UNDER STATE LAW AND IMPLICIT IN ANY REVIEW BASED ON JACKSON V. VIRGINIA.

As reflected above in the quotation from Petitioner's motion for rehearing to the Court of Criminal Appeals, (see Exhibit 2 attached to Respondent's response at page 3), Petitioner affirmatively stated that the utilization of the "exclusion of outstanding reasonable hypothesis test" was proper, well established under state law, and implicit in any review based on *Jackson v. Virginia, supra.*

In its petition for certiorari, Petitioner has not only disregarded its previous representations to the Court of Criminal Appeals, Petitioner has also affirmatively misled this Court concerning what it did in fact represent to the Court of Criminal Appeals. It bears repeating: Petitioner's motion for rehearing did not allege that the Court of Criminal Appeals had misapplied *Jackson v. Virginia, supra,* contrary to the assertions of Petitioner. See Pet. at 2. Any cursory review of the motion for rehearing will reflect the accuracy of this statement.

Notions of comity indicate that this Court should not review matters which were not presented to the Court of Criminal Appeals. *Webb v. Webb, supra.* Furthermore, Petitioner's express representations contained in its motion for rehearing concerning the propriety of the "exclusion of outstanding reasonable hypothesis test" should be held as inconsistent with its position at trial and on appeal. Under the ruling in *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Government may not raise issues before this Court:

> " . . . when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Id.,* at 1646.

Cf. Wilson v. State, 692 S.W.2d 661 (Tex. Cr. App. 1984) [citing and following *Steagald*]. Since Petitioner actually affirmatively represented that the standard utilized (i.e., "the exclusion of outstanding reasonable hypothesis test") was well settled in " . . . Texas Criminal Jurisprudence and is 'implicit' in any review based on *Jackson* . . . ", Petitioner should not now be allowed to assert

otherwise. This change in position did not afford the Court of Criminal Appeals an opportunity to address, directly or indirectly, the question presented in its certiorari petition, and therefore, this Court should deny certiorari.[1]

5. PETITIONER'S COMPLAINT TO THE COURT OF CRIMINAL APPEALS REGARDING THE EXCLUSION OF REASONABLE HYPOTHESIS TO A "MORAL CERTAINTY" DID NOT PRESERVE PETITIONER'S RIGHT TO SEEK THIS COURT'S REVIEW OF THE "QUESTION PRESENTED".

Petitioner's complaint in its motion for rehearing regarding the exclusion of all reasonable hypothesis to a "moral certainty" did not include, directly or indirectly, any complaint that the Court of Criminal Appeals had

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[1] Petitioner mentioned the "question presented" *only after* the Court of Criminal Appeals denied Petitioner's motion for rehearing on May 2, 1990. In Petitioner's first motion for stay, filed with the Court of Criminal Appeals on or about May 5, 1990 (see Exhibit 5 to Respondent's July 16, 1990, submission to this Court opposing Petitioner's anticipated motion for stay), Petitioner asked the Court to stay the execution of the mandate because: "The petition for review to this Court presents a substantial federal question: Whether the Texas Court of Criminal Appeals has misapplied the United States Supreme Court ruling in Jackson v. Virginia (citation omitted) and it's progeny by using an incorrect standard in analyzing the sufficiency of evidence in a circumstantial evidence case". It should be noted that Petitioner did not, in that stay document, even point out *how* the Court of Criminal Appeals had allegedly misapplied the rule of *Jackson v. Virginia*. Furthermore, Petitioner did not file a second motion for rehearing asking the Court of Criminal Appeals to consider that question.

misapplied the standard of *Jackson v. Virginia, supra.* Even a cursory review of Petitioner's motion for rehearing will reveal the accuracy of this statement.

Also, as noted in Respondent's response to Petitioner's motion for rehearing (contained in Exhibit 3 attached to Respondent's response filed with this Court on or about July 16, 1990), the opinion of the Court of Criminal Appeals did not *actually* employ a test whereby all reasonable hypothesis were excluded to a moral certainty. As stated by Respondent (see Exhibit 3 at pages 13-14):

> " . . . the plain language of the opinion in this case indicates that an exclusion to a moral certainty "test" was not ACTUALLY employed by the Court. There were three portions of the opinion regarding the standard of review governing the Court's analysis of the evidence in this case. In order of appearance, they are as follows:
>
> > (1) "In both circumstantial evidence and direct evidence cases the standard by which evidence is reviewed is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Houston v. State, 663 S.W.2d (Tex. Cr. App. 1984); Carlsen v. State, 654 S.W.2d 444 (Tex. Cr. App. 1983); Bulter v. State, 759 S.W.2d 234, 238 (Tex. Cr. App. 1989). In Denby v. State, 654 S.W.2d 457, 464 (Tex. Cr. App. 1983) (Opinion on Rehearing), this Court noted that 'if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding.' Proof which amounts to only a strong suspicion or mere probability is insufficient. It is

the appellate courts' function to ensure that no one is convicted of a crime except on proof beyond a reasonable doubt."

"After viewing the evidence in the light most favorable to the verdict, as we are constrained to do, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), we find that we agree with appellant as to both points. Although there is plentiful evidence to show that appellant made numerous threats against the victim and that two weeks before the offense he was in possession of materials similar to those used in the commission of the offense, we find no evidence which connects appellant with the actual setting of the bomb, nor is there any evidence showing that he solicited, encouraged, directed, aided or attempted to aid another to place the bomb. V.T.C.A., Penal Code, Section 7.02(a)(2). The evidence, even when viewed in the light most favorable to the verdict, suggests at least one hypothesis other than the guilt of appellant: that is, that someone else unbeknownst to appellant committed the offense". Slip op. at 9-10.

(2) "Although the evidence against appellant leads to a strong suspicion or probability that appellant committed this capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt. Nathan v. State, 611 S.W.2d (Tex. Cr. App. 1981); Flores v. State, 551 S.W.2d 364 (Tex. Cr. App. 1977). Specifically, there remains the outstanding possibility that someone other than appellant committed the offense." Slip op. at 14.

> (3) "We see no difference between *Nathan. Flores* and the instant case. Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so. The judgement is reversed and an order of acquittal is entered. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)." Slip op at 16.
>
> The first and third references do not contain any mention of the 'moral certainty' test. Only the second reference contains a reference to the 'moral certainty' test, and the second reference is not the 'holding' of the opinion."

Accordingly, it is clear that Petitioner's complaint on motion for rehearing did not preserve the question which Petitioner seeks this Court to review. *Cf. Bloeth v. New York, supra; Webb v. Webb, supra.* Certiorari should be denied.

6. THE STANDARD OF REVIEW UTILIZED BY THE COURT OF CRIMINAL APPEALS HAS BEEN UTILIZED IN TEXAS FOR OVER 100 YEARS AND THIS COURT SHOULD NOT REVIEW A DECISION BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW BASIS.

As reflected above in the quotation from Petitioner's motion for rehearing, Petitioner conceded in his motion for rehearing that the standard employed by the Court of Criminal Appeals is well settled in Texas jurisprudence. Accordingly, Petitioner's assertion that the opinion rested primarily upon federal law and that an independent state

law ground was not apparent from the four corners of the opinion, pet. at 4, is not well taken. Indeed, Petitioner's concession in its motion for rehearing that the test is well settled in Texas jurisprudence should estop it from asserting that an adequate and independent state law basis does not exist, particularly given Petitioner's failure to present the "question presented" to the Court of Criminal Appeals (which failure denied the Court of Criminal Appeals a concrete reason and opportunity to clarify, if it did not, the fact that the test employed was premised on over 100 years of well settled state law).

The existence of an adequate and independent state law basis for the decision of the Court of Criminal Appeals clearly indicates that review by this Court would be inappropriate. And, there can be no question that it is a state law standard. See also *Montgomery v. State*, ___ S.W.2d ___ (No. 1090-88; delivered May 30, 1990) (McCormick, Presiding Judge, for the Court, stated that "Texas law" dictates that outstanding reasonable hypothesis inconsistent with guilt have to be considered on appeal where insufficient evidence has been alleged).

The "exclusion of outstanding reasonable hypothesis test" utilized by the Court of Criminal Appeals in this case has been utilized in Texas for over 100 years. See 24 Tex. Jur. 2d, Evidence, Section 742, p. 422, cited with approval in *Flores v. State*, 551 S.W.2d 364 (Tex. Cr. App. 1977) (one of the cases cited by the Court of Criminal Appeals in the instant opinion). Indeed, at page 423 of this volume of Texas Jurisprudence, the following statement is made:

> "In felony cases, specially where death sentence has been imposed, appellate court rigorously

> insists on moral certainty of guilt of one convicted on circumstantial evidence". (citing sixteen Texas cases going back to 1869)

Indeed, the first case cited at page 422 after this quotation is *Perkins v. State*, 32 Tex. 110 (*1869*), where the Court,in a noncapital felony, stated:

> " . . . in all trials for felony, involving the liberty or the life of a party, the circumstances to show the guilt of the party charged, must be of a conclusive nature and tendency. Wherever any other hypothesis can be predicated on the facts proved, consistent with the innocence of the party accused, it would be tyranny, oppression and the grossest injustice, to demand a victim to expiate an offense against the law from such uncertain demonstrations by the evidence . . . And unless there were sufficient circumstances, developed by the testimony, to fix a rational conviction in the mind that it was the one, rather than the other (i.e., one person who might have stole the property as opposed to another who might have stole the property), neither the verdict nor the judgment ought to be permitted to stand." (explanation added).

Similarly, in *Kunde v. State*, 3 S.W. 325 (Tex.Ct.App. 1886), the Court stated:

> "The twenty-second assignment of error calls in question the sufficiency of the evidence to support the conviction. Circumstantial evidence alone is relied upon by the state to sustain the conviction. After very careful and repeated examination of the evidence as presented in the statement of facts, we unhesitatingly say that to our minds it is wholly insufficient to warrant the conviction. There are but few circumstances which tend even remotely to prove this defendant's connection with the murder, and none of

> these inculpatory circumstances are at all inconsistent with his innocence, nor are any of them incapable of explanation upon any other hypothesis but that of his guilt. Taken altogether, the circumstances are far from being of a conclusive nature. They do not lead the mind to a satisfactory conclusion, and do not produce a reasonable and moral certainty of the defendant's guilt; in other words the evidence, being wholly circumstantial, is not of that force, certainty, and conclusiveness demanded by the law in support of a conviction for felony. Pogue v. State, 12 Tex. App. 283; Lovelady v. State, 14 Tex. App. 545; Rye v. State, 8 Tex. App. 153; Hunt v. State, 7 Tex. App. 235; Robertson v. State, 10 Tex. App. 602; Black v. State, 1 Tex. App. 369; Barnes v. State, 41 Tex. 342."

Clearly, the "exclusion of outstanding reasonable hypothesis test" has been a consistent and uniform aspect of Texas law for over 100 years. Petitioner's efforts to convince this Court that there was no clear indication that the opinion of the Court of Criminal Appeals rests on an adequate and independent state law ground, Pet. at 4, n.1, is not well taken given the historical background of the "exclusion of outstanding reasonable hypothesis test" in Texas, Petitioner's concession in his motion for rehearing that it is a well settled portion of Texas jurisprudence, and the reliance of the Court of Criminal Appeals upon *Flores v. State, supra,* which was decided well before *Jackson v. Virginia, supra.* Even Judge Berchelmann, who dissented with written opinion, utilized the "exclusion of reasonable hypothesis test". Pet. at A-17. And, it should be recalled Texas is free to afford more protection to its citizens than that amount mandated by the Constitution

of the United States. Clearly, this is what Texas has done as a matter of state law.

Furthermore, Respondent would point out that under the Eighth and Fourteenth Amendments, a heightened scrutiny of the evidence on appeal -- which is what Petitioner is attempting to complain about -- is not appropriate in a capital case. Denial of certiorari is appropriate.

7. GRANTING THE PETITION FOR WRIT OF CERTIORARI WOULD VIOLATE RESPONDENT's RIGHTS AGAINST DOUBLE JEOPARDY, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, ___ L.Ed.2d ___ (1962), this Court held, in essence, that once a verdict of acquittal is entered, no matter how egregiously erroneous the foundation therefor, the double jeopardy clause of the Fifth Amendment would prevent review of that acquittal and a retrial.

Respondent believes that under more recent pronouncements of this Court, see e.g., *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), there is indeed a serious question of whether this Court can review a state court judgment of acquittal without violating the double jeopardy clause of the Fifth Amendment.[2]

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[2] Respondent recognizes that *Burks* does not affirmatively answer this question, but his interpretation of *Burks* is consistent with *Fong Foo, supra*. Respondent also acknowledges that *Burks, supra* at 5, noted that "[t]he United States has not cross-petitioned for certiorari on the question of whether the Court

(Continued on following page)

Indeed, the bottom line of Petitioner's request is to obtain another bite at the apple: to obtain a third opportunity to convince the Court of Criminal Appeals that the evidence was sufficient for any rational trier of fact to have found Respondent guilty as an individual actor or as a party. The Court of Criminal Appeals, in its original opinion, held that no rational trier of fact could have found Respondent guilty under either theory. The State then sought a second bite at the apple in its motion for rehearing, which the Court of Criminal Appeals rejected. Now, Petitioner wants this Court to order the Court of Criminal Appeals to again consider the sufficiency of the evidence. This action violates the Fifth Amendment's bar against double jeopardy and runs counter to notions of comity. Certiorari should be denied.

(Continued from previous page)

of Appeals was correct in holding that the Government had failed to meet its burden of proof with respect to the claim of insanity. Accordingly, that issue is not open for review here".

Of course, in *Burks*, the defendant had raised a prima facie defense of insanity and the government had failed to fulfill its burden to effectively rebut that insanity, which is different from a situation where, as in the present case, the prosecution has failed to meet its burden of production and persuasion regarding the elements of the offense. In this regard, Respondent herein moved for an instructed verdict at the close of the prosecutions' case R. XX – 550-558, at the close of all of the evidence, R. XXIII – 970-971, in his motion for new trial, R. I – 83-88, and in his first amended motion for new trial, R. I 89-95. All of these efforts to obtain a ruling of insufficient evidence contained the same grounds as reflected in Respondent's brief to the Court of Criminal Appeals (Grounds of Error Nos. 1, 2, 5, 6, and 7).

8. THE JUDGMENT OF ACQUITTAL WAS PROPERLY ENTERED BY THE COURT OF CRIMINAL APPEALS OF TEXAS.

In a well reasoned opinion authored by Presiding Judge McCormick, the Court of Criminal Appeals held that the evidence was insufficient for any rational trier of fact to have found Respondent guilty as an individual actor or as a party. Respondent begs this Court to read his motion for rehearing attached to Respondent's response filed with this Court on July 16, 1990. That motion for rehearing, along with the original brief of Respondent at grounds of error six and seven, unequivocally demonstrate that the Court of Criminal Appeals was correct when it held that the evidence was insufficient.

Two brief excerpts and one comment from that motion for rehearing are appropriate. First, as reflected at page 5 of Respondent's motion for rehearing:

> " . . . at the hearing on the motion for new trial, the State did not even argue that the evidence was sufficient to show individual liability, only party liability. See R. XXVI-124, L. 2-13, apparently made in response to the Court's comments at R.XXVI-99, L. 8-22.
>
> Also, the State has ignored the fact that the trial judge found there was no evidence to show Appellant was in Odessa at the time of the commission of the offense and the conviction had to be made on the law of parties. R. XXVI-99, L. 8-15 (hearing on motion for new trial and amended motion for new trial)."

Second, as reflected at pages 8 to 9 of Respondent's motion for rehearing:

"The State has failed to prove the preliminary facts essential to a finding that Appellant was involved in the bombing. At pages 26-27 of his original brief on appeal, Appellant noted that:

"The State failed to establish when the vehicle was last driven by anyone on Friday, April 23, 1982, and that Appellant did in fact place an explosive weapon on the vehicle after it was last driven. Indeed, the State was so enthralled with the various threats made by Appellant that it failed to introduce evidence, if it existed, that Appellant: (1) knew where Joe Neal lived; (2) knew that Joe Neal drove a pickup truck, let alone what type and color of truck and/or the license number of that truck; and (3) knew that Joe Neal parked that truck in the Furr's parking lot. In this connection, not only did the State fail to elicit evidence to these necessary facts, the State declined the opportunity to cross-examine Appellant on them. (11)"

> (11) The State did cross-examine Appellant as to whether he knew where Joe Neal was working in late 1980, and Appellant was not sure. R.XXII-829. The vehicle which was blown up was a 1982 pickup. R.XVII-15. There is no evidence Appellant had ever seen Joe Neal in that vehicle or knew that it was driven by Joe Neal. The State and the jury simply assumed Appellant knew this as well as the location where Joe Neal lived as of April 24, 1982. This may explain the State's failure to introduce evidence of ownership, as demonstrated in GROUND OF ERROR NO. 5

"Without evidence of Appellant's knowledge of these elementary facts, the jury could not have logically found that Appellant would have been able to personally place the explosive weapon

> on the vehicle. No one testified that Appellant had any personal contact with Joe Neal after Neal left Husky in 1980. Too, no one testified that Appellant, at any time, drove by Neal's house or was at Neal's house at any time. Similarly, the State failed to produce any evidence that Appellant was in Odessa on April 23, 1982, after the vehicle was 'finally, parked and thus had an *opportunity* to place the explosive weapon on the vehicle before 7:30 a.m. on April 24, 1982."

The comment is as follows: As reflected at pages 10 to 12 of the motion for rehearing, Petitioner also ignored the evidence developed on a motion for new trial which showed that the State of Texas had suppressed evidence which showed that there was a reasonable doubt that two men other than Respondent were involved in the bombing.

In light of the contents of the motion for rehearing, it is understandable why the Court of Criminal Appeals rejected Petitioner's pleas for rehearing. Simply stated, no rational trier of fact could have found Respondent committed the offense and the Court of Criminal Appeals properly entered an acquittal.

9. APPLICATION OF THE EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST IS NOT A CONSTITUTIONAL VIOLATION.

Petitioner attempts to insinuate that application of the exclusion of outstanding reasonable hypothesis test is a constitutional violation. In addition to the comments stated above regarding the lack of jurisdiction and the lack of any constitutional right to which Petitioner is

entitled, it should be noted that neither *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) nor *Jackson v. Virginia, supra* held as unconstitutional a standard of appellate review based on the exclusion of outstanding reasonable hypothesis. Indeed, *Holland, supra.* addressed the trial court's failure to instruct the petite jury that in assessing the government's case, it must exclude every reasonable hypothesis other than guilt. The Court stated:

> "There is some support for this type of instruction in the lower court decisions . . . (citations omitted), but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

Similarly, in *Jackson* this Court rejected the "no evidence" rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and set forth the rule to be applied by federal judges reviewing state sufficiency challenges via federal habeas corpus. In applying that rule (i.e., whether any rational trier of fact could have found every element of the offense beyond a reasonable doubt), the Court held the evidence sufficient and noted, in passing, that:

> "Only under a theory that the prosecution was under an affirmative duty to rule out *every hypothesis* except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland v. United States* (citation omitted). We decline to adopt it today." (emphasis added)

The Court in *Jackson*, it should be noted, cited Holland. but omitted a critical word: "REASONABLE". *Jackson*

thus rejected the notion that the prosecution must rule out *every* hypothesis except guilt, but it did not necessarily reject the notion that the prosecution must rule out every *REASONABLE* hypothesis but guilt. And certainly there is nothing in *Holland* or *Jackson* that would indicate a constitutional violation if a state court uses a standard more favorable to the citizen accused.[3] Certiorari should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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[3] Contrary to the express wording of *Holland*, the jury was not instructed (let alone properly instructed) on the standards for reasonable doubt. See Respondent's Supplemental Brief at page 55 (Ground of Error No. 67), filed on May 20, 1986.